SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE

UNITED STATES

October Term 1968

No. 1257

HELEN LOPO, by her Guardian Ad Litem, SYLVIA TINA LOPO,

Plaintiff and Appellant,

vs.

SAKS FIFTH AVENUE, a New York Corporation,

Defendant and Appellee.

MOTION TO DISMISS

APPEAL FROM
COURT OF APPEAL OF THE
STATE OF CALIFORNIA

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MOTION TO DISMISS

Appellee Saks Fifth Avenue moves the Court to dismiss the appeal on the following grounds:

1. The appeal was not taken in time, and therefore, not being taken in conformity to statute or the rules, is not within the jurisdiction of this Court;

2. The appeal has not been diligently prosecuted;

3. There is no substantial federal question presented; and

4. The judgment rests on adequate non-federal bases.

These are discussed individually in the same order.

NATURE OF THE CASE

This is a common law tort action seeking damages for alleged false imprisonment of a person by a storekeeper. It was tried in a state court before a jury which unanimously found for the appellee-defendant. The judgment entered on the jury's verdict was affirmed on appeal to the California Court of Appeal and the California Supreme Court denied appellant's petition for further review.

Appellant has docketed an appeal.

I

THE APPEAL IS UNTIMELY

The record filed with this Court discloses that on December 4, 1968, the Supreme Court of California (which is the highest court of the

state in which a decision could be had) entered its order denying appellant's petition for hearing by that court.

The controlling statute 1/ sets 90 days as the time in which appeal must be taken or a petition for certiorari filed, following the entry of the state-court judgment (at least in the absence of extension of time, which was not granted here). March 4, 1969 was the 90th day following the entry of the last California order. The notice of appeal was filed March 10, 1969.

Appendix B to the Jurisdictional Statement is the remittitur issued by the California Court of Appeal, Second Appellate District, notifying the trial court of the finality of the appellate judgment. Under California practice it is nothing more than that: A form for giving formal notification of appellate action. The assertion in the Jurisdictional Statement that the "judgment or remitter [sic]" was rendered December 18 is, therefore, inaccurate. The

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1/ "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within 90 days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding 60 days."

28 U.S.C. §2101(c).

actual record on appeal discloses the denial of hearing by the California Supreme Court by order made on December 4, 1968.

It has long been settled that the existence of a latent power to grant a hearing or rehearing by sua sponte action of a state court does not defer the running of the statutory time for appeal to this Court. Under the specific California appellate scheme, the time for invoking this Court's jurisdiction commences to run with the denial by the California Supreme Court of a petition for hearing by that court.

> Market Street Railway Co. v. Railroad Commission, 34 U.S. 548, 551-2, 89 L. Ed. 177, 65 S. Ct. 770 (1945).

Therefore, the appeal was timely and subject to dismissal on that ground.

> Pittsburgh Towing Co. v. Mississippi Valley Barge Line Co., 385 U.S. 32, 32-33, 17 L. Ed. 2d 31, 87 S. Ct. 195 (1966);
>
> Territo v. United States, 358 U.S. 279, 3 L. Ed. 2d 298, 79 S. Ct. 312 (1959);
>
> Ashton Power Wrecker Equipment Company v. Michigan, 344 U.S. 870, 97 L. Ed. 674, 73 S. Ct. 167 (1952).

II.

THE APPEAL SHOULD BE DISMISSED FOR LACK OF PROSECUTION

Under revised Rule 13(1), appellant was required to docket the case not later than March 4, 1969, the 90th day, unless the time for docketing had been extended; applications for extension are not favored. As of the 90th day, the appeal had not been docketed nor had any extension been sought or granted.

The record shows that on March 24, the 110th day, appellee moved in the court possessed of the record (the Court of Appeal of the State of California, Second Appellate District) for an order dismissing the appeal, pursuant to revised Rule 14(2).

Under California practice, a motion of that type is deemed made as of the time written notice of intent to so move is given to the adverse party, but the court may not act thereon until the date specified in the written notice, at which time the motion is presented to the court in open session.

California Code of Civil Procedure, §1005.5.

The first calendar date of the state court was April 10. At that time, Mr. Justice Douglas having extended time for docketing until

April 14, the state court continued the motion to dismiss. The case was docketed in this Court on April 14.

The fact remains, however, that 110 days had passed as of the time the motion was made in the court below. Furthermore, the order of Mr. Justice Douglas was expressly made "without prejudice to the Court's consideration as to whether or not the application was timely received." [Order of March 29, 1969].

Since the application to extend was not even presented to this Court or a Justice of this Court prior to the expiration of the time allowed therefor, it was not timely.

Rule 34(2).

Therefore, the motion is renewed on the ground of nonprosecution in this Court, the state court properly deeming itself prevented from passing on nonprosecution once the appeal is docketed with this Court. Whether or not the 20-day delinquency would provide an independent ground for dismissal, it certainly provides an additional ground under all of the facts of this case.

III

THERE IS NEITHER JURISDICTION NOR A SUBSTANTIAL FEDERAL QUESTION

A. THE EXPRESS JURISDICTIONAL PREMISE, STATE-COURT INVALIDATION OF FEDERAL LAW, IS NOT INVOLVED IN ANY WAY

Appellant seeks to invoke this Court's appellate jurisdiction [Jurisdictional Statement, pages 5-6] exclusively on the ground that the case draws into question the validity of a treaty or statute of the United States, with the decision below against the validity thereof.

28 U.S.C. §1257(1).

No statute or treaty of the United States is specified, nor did the action draw into question any. Much less did the California Court of Appeal invalidate any treaty or Act of Congress.

The state-court opinion below is a rather pedestrian disposition of a common law tort action primarily on the facts and state procedural niceties. It does not say a single word about any Act of Congress; a fortiori, it does not invalidate any.

As a matter of fact, the appellant's opening

brief in the state court does not even mention any treaty or Act of Congress. The only statute mentioned in appellant's opening brief [page 46] was a then-repealed California enactment allowing one party to examine an adverse party as though on cross examination.

Former California Code of Civil Procedure §2055.

Appellee's brief in the state court did not rely upon or discuss any federal enactments. Appellant's reply brief in the California court mentioned one additional California statute (also then repealed), 2/ and made no mention of any matter of federal law.

The first reference to federal law appeared in appellant's petition for rehearing in the state court, in which [pages 31-33] she claimed that she had been deprived of the right to be protected against unlawful search and seizure, the guarantee of trial by jury and due process in a federal prosecution and the right to counsel and compulsory process in a federal prosecution.

United States Constitution, Amendments, Amendments IV, V and VI.

That petition for rehearing was denied.

2/ Former California Code of Civil Procedure §1880, dealing with testimonial capacity of witnesses.

The California court did not decide against the validity of the Fourth, Fifth or Sixth Amendments.

Appellant's petition for hearing by the California Supreme Court mentioned only the same portions of the Bill of Rights. In denying a hearing, that court refrained from taking any action concerning the Amendments.

In the jurisdictional statement [page 4], appellant makes the bald statement that something violates a specified Act of Congress: 18 U.S.C. §241. The validity of that statute remains completely unimpeached by any act of the state court. There is no basis for this Court's exercise of jurisdiction on the ground stated.

> Ivanhoe Irrigation District v. McCracken, 357 U.S. 275, 290, 2 L. Ed. 2d 1313, 78 S. Ct. 1174 (1958);
>
> Flournoy v. Wiener, 321 U.S. 253, 262, 88 L. Ed. 708, 64 S. Ct. 548 (1944).

B. THERE IS NO OTHER JURISDICTIONAL BASIS PRESENTED IN THE RECORD

Moreover, even if the Court were to look beyond the specific basis of jurisdiction urged

by appellant, it would still be manifest that no substantial federal question was timely raised in the state courts. In fact, there is no federal question of any kind which has ever been raised.

This was a civil action sounding in the common law tort of false imprisonment, based upon appellee's detention of appellant for a few minutes in a store to investigate suspicious circumstances and activities of appellant, which brief detention was terminated by the arrival of police officers who took over the matter in its entirety. Appellant's contentions in the state appellate courts were three-fold:

1. An allegedly erroneous instruction given at appellant's own request concerning the burden of proof on certain issues under state law [Opening Brief, pages 27-34];

2. Alleged error in appellee's questioning of one of appellant's witnesses as to when the witness had recovered her mental competence, the witness having been found incompetent in a previous trial of this same case [Opening Brief, pages 44-53];

3. Purported prejudicial misconduct of the state trial judge consisting of his utterance of the following sentence concerning one of appellee's employees who testified: "Well, he is a gracious fellow." This was said in response to a jesting remark by appellant's own counsel [Opening Brief, pages 54-65].

As to the first point, the state appellate court held that the instruction given on probable cause to detain a suspect was accurate, insofar as it went, under California law; that the failure of the trial court to elaborate on the instruction could not be the subject of appellate complaint when no amplifying instructions had been requested during the trial; and that the generality of the charge actually benefited appellant and she was therefore barred from complaining of an error favorable to herself [Opinion, pages 5-8]. The other two contentions were held, under California law, to be totally devoid of merit [Opinion, page 8].

Appellee submits that the statement of these contentions is sufficient to refute appellant's contention that they are "without doubt the most vital Due Process, and Civil Rights issues encompassed in the United States Constitution" [Jurisdictional Statement, page 19]. The more accurate characterization is set forth later in the statement where appellant candidly admits that the issues in this case are strictly ones "governed by rules of civil law" [Jurisdictional Statement, page 20], and therefore matters of state practice. They are anything but constitutional in scope.

The record discloses that this case was tried twice. Two successive juries failed to accept appellant's version of the facts, although the adverse version of one was vacated by a California trial court on the ground of procedural error. The purely factual questions were resolved by those two juries and the state

law questions were resolved by the state courts. The thrust of the jurisdictional statement is that appellant's version should have been believed and she should have won. That is no basis for invoking this Court's jurisdiction.

IV

THE JUDGMENT RESTS ON ADEQUATE NON-FEDERAL GROUNDS

As discussed above, the questions presented are strictly ones of California tort law. Application of that law is the function of the California courts.

Moreover, the invited-error and estoppel-to-assert-error aspects of the decision below are abundant to support the affirmance of the trial court judgment. It is bromidic to state that where such is the case there is no basis for invoking this Court's appellate jurisdiction.

V

UNDER RULES 5 AND 39 THE APPELLATE PAPERS, FILED BY A NON-LAWYER ON BEHALF OF ANOTHER PERSON, SHOULD BE STRICKEN AS IMPROVIDENTLY FILED

Appellee also questions whether the documents lodged with this Court are validly filed. The rules require that any filing in this Court be accomplished in the name of a member of the bar of this Court.

Rule 39(2);

Cf., Rule 5.

Sylvia Tina Lopo is not a member of the bar of this Court -- or any other bar, for that matter. She is a non-lawyer purporting to represent her mother. The record discloses that her self-denomination as being in pro se ("pro per") is a misstatement. The appellant is Helen Lopo, not Sylvia Tina Lopo, and therefore the only person who could prosecute this appeal pro se would be Helen Lopo. Not another non-lawyer, even one related to her.

The fact that Miss Lopo was appointed guardian ad litem for her mother is immaterial. Under state law that appointment does not empower the guardian ad litem to proceed pro se in a representative capacity.

City of Downey v. Johnson,
263 A. C. A. 896, 899-900,
69 Cal. Rptr. 830, 833-834
(1968). 3/

Moreover, it would be somewhat anomalous to conclude that appointment of Miss Lopo by the California nisi prius court had the effect of admitting her to the bar of this Court pro hac vice. This irony is merely multiplied when one realizes that many attorneys throughout the country, although fully possessed of qualifications to practice before this Court, are barred from acting for their clients because of lack of admission before this Court. It is difficult to rationalize a contrasting rule in which persons with neither professional training nor professional responsibility may arrogate to themselves the right of self-appointment to act as attorney for others.

Appellee is not suggesting any technicality-type denial of the important right to represent oneself. Appellee does suggest that any extension of that right into the arena of one lay-man's representing another should be accomplished, if at all, only carefully and

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3/ The holding on that issue in the case cited was one of first impression in California. In the course of decision, however, the California court examined the other jurisdictions which have passed on the question, finding them entirely in accord.

diligently and under control, and not by unilateral act of the would-be "pro se lawyer".

For this additional reason the appeal should be dismissed.

CONCLUSION

For the foregoing reasons the appeal should be dismissed. Since each of these defects applies equally to review by certiorari, certiorari should also be denied.

Respectfully submitted,

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